SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-104
District Docket No. IV-2012-0015E

IN THE MATTER OF	:	
ERYK ANTHONY GAZDZINSKI	:	
AN ATTORNEY AT LAW	:	Decision

Argued: June 19, 2014

Decided: October 1, 2014

Anne T. Picker appeared on behalf of the District IV Ethics Committee.

David H. Dugan, III appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a recommendation for discipline (reprimand) filed by the District IV Ethics Committee (DEC). The complaint charged respondent with violating RPC 1.5(b) and R. 5:3-5(a) (failure to prepare a written fee agreement in a civil family action); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), more properly, RPC 8.1(a) (submitting a false statement to a disciplinary authority); RPC 8.1(b) (failure to cooperate with disciplinary authorities); and

RPC 8.4(d) (conduct prejudicial to the administration of justice).

The DEC recommended a reprimand. For the reasons set forth below, we agree with the DEC's recommendation.

Respondent was admitted to the New Jersey bar in 1984. He has no disciplinary history.

At the outset of the disciplinary hearing, counsel for respondent stipulated that respondent violated RPC 1.5(b) and R. 5:3-5(a) by failing to prepare a written fee agreement in a family matter in which he represented the grievant, Jonathan White. Further, respondent did not dispute that, in a fee arbitration matter that White initiated, respondent agreed to refund a portion of his fee, in exchange for the dismissal of the ethics grievance concurrently filed against him. Although respondent admitted the conduct, he proffered a defense to it.

Specifically, respondent asserted a belief that the stipulation to dismiss the ethics grievance was acceptable because the fee arbitration committee had approved it. On May 18, 2012, he informed the DEC investigator about the stipulation. During that call, the investigator said that she had questions about the resolution of that issue. She extended the time for respondent to reply to the grievance by thirty days.

Respondent further claimed that, once the Office of Attorney Ethics (OAE) reviewed the stipulation and informed him that, if he did not refund the fee, the OAE would file a motion for his temporary suspension, he immediately paid the fee to White. Respondent explained that he had delayed refunding the fee, from May until October 2012, because he was waiting for advice from ethics authorities as to the propriety of the stipulation.

The other charges against respondent -- failure to cooperate with and false statements to disciplinary authorities -- remained in dispute.

The facts are as follows:

In March 2009, White consulted respondent about a divorce. White's mother paid the fee for that consultation. White neither signed a fee agreement nor retained respondent at that time. He met with respondent again, in March 2010, about a domestic violence restraining order recently obtained by his wife. This time White did retain respondent. The matter resulted in several court appearances, over two months, with no final resolution. White eventually terminated the representation and hired another attorney.

In March 2012, White filed a grievance against respondent and also filed for fee arbitration. The latter concluded in a

dismissal, in May 2012. The ethics matter culminated in a hearing, on October 22, 2013.

At the ethics hearing, respondent acknowledged that the presenter had extended, by thirty days, his deadline for replying to White's grievance. He also conceded that the presenter had sent him a follow-up letter, on June 7, 2012, reminding him of the deadline and requesting, in addition to the information previously sought, any documentation regarding the fee arbitration.

By letter dated June 15, 2012, respondent provided the investigator with a copy of the settlement agreement for the fee arbitration, a letter from the fee arbitration committee, and an itemized billing account for the White matter. At the ethics hearing, when respondent was questioned about the billing notations, he admitted that he had not made formal ledger notations for the White matter, but had simply kept notes on a yellow legal pad, due to the "unique billing circumstances" of the matter. The hearing panel asked respondent whether he believed, at any point, that those yellow sheets of paper with his billing notations were germane to the ethics investigator's requests for information. Respondent replied that, at the time, there were no billing issues, since they had settled the fee arbitration. He, therefore, believed that those materials were

not relevant. He maintained that he had provided everything that the investigator had requested.

Respondent acknowledged that, on June 19, 2012, the investigator sent him a letter pointing out deficiencies in his production of documents, including the lack of a copy of the fee agreement with White and any bills sent to him. That letter set June 27, 2012 as the final deadline for the production of the documents. When asked whether he had provided copies of the agreement and bills, respondent replied that he had provided everything he had, which did not include copies of bills.

At the ethics hearing, the presenter also questioned respondent about the discrepancy in his billing between his submissions to the fee arbitration committee and to her, during the ethics investigation. Respondent explained that he had inadvertently omitted a particular court appearance from the fee arbitration submission. He added that, after reading White's submissions, he later recalled that appearance and then included it in his production, in order to make a complete accounting. He again confirmed that he had used his yellow legal pad notes to help develop the accounting provided to the investigator.

The presenter then asked respondent whether he had complied with her November 12, 2012 letter, in which she again had asked for the entire White file and a copy of the $1,400 check that

respondent had sent to White. That letter also asked for confirmation that there was no executed fee agreement. Respondent admitted that, other than providing a copy of the check, he had not replied to the specific questions contained in the letter.

Respondent acknowledged that, despite the investigator's request for the entire file, he had not sent the blank confidential litigant information statement or certification of insurance coverage he claimed to have in the White file. Although he maintained that he had sent to the investigator a copy of a bill that he had issued to White, he admitted that the billing was simply in the body of an email that he had sent to White. That particular email also acknowledged the termination of the representation and stated that White's remaining balance was $400.

According to respondent, he sent three letters to the investigator, in response to her requests for information. On June 27, 2012, he sent a letter stating that he was providing documents that he believed addressed her requests. He asked the investigator to let him know if he had not fully complied with her requests.

In a second letter, dated July 6, 2012, respondent addressed the difference between his billing submissions to the

fee arbitration panel and to the investigator. He explained that he was not increasing his fees, but was trying to be as inclusive as possible in his submission. Attached to this letter were emails between respondent and White.

In the third letter, dated August 24, 2012, respondent reiterated that he would refund White the $1,400, as soon as he was authorized to do so by the investigator. He again closed the letter asking to be contacted, if the investigator still believed that he had not complied with her requests.

In turn, the investigator denied having received the June 27, 2012 letter. When she asked respondent whether he could provide proof that he had sent it, he replied that he could not. She compared respondent's unsigned June 27, 2012 letter to his July 6, 2012 letter, which was signed. Ultimately, the June 27, 2012 letter was not admitted into evidence.

The DEC determined that, because White was not a regular client of respondent, a written fee agreement setting forth the rate and scope of services was necessary for the representation undertaken in 2010. The DEC noted that both respondent and White had testified that no signed fee agreement existed. The DEC also noted respondent's admission that he had asked White to withdraw the grievance, in exchange for a resolution of the fee arbitration issue.

The DEC did not find that respondent acted improperly by providing one set of billing records to the DEC investigator and a separate set to the fee arbitration committee. It determined that respondent's lack of billing records and of a formal billing system contributed to the fact that he had turned over two separate time records, finding it highly unlikely that this was done with any deceptive intent. Rather, the DEC found that the discrepancy stemmed from a lack of formalized recordkeeping. The DEC, thus, dismissed the charge of a violation of RPC 8.4(c), more properly RPC 8.1(a).

On the other hand, the DEC found that respondent failed to cooperate fully with the investigation, a violation of RPC 8.1(b). After noting that respondent had replied to several of the investigator's requests and had provided various documents, the DEC found that he had failed to supply the "yellow sheets" that, he testified, were his billing records. The DEC remarked that, until the ethics hearing, it was unclear whether the investigator/presenter was even aware how respondent kept his billing records.

In mitigation, the DEC considered that respondent's misconduct was limited to a single event, that it was not done for personal gain, and that it caused no harm to the client. The DEC also took into account respondent's clean disciplinary

record. In aggravation, the DEC considered that respondent had no billing system in place, failed to cooperate with disciplinary authorities, and displayed an obvious lack of contrition at the hearing.[1] The DEC determined, however, that the mitigating and aggravating factors balance out.

Mistakenly believing that conditions cannot be imposed with an admonition, the DEC recommended that respondent receive a reprimand, with the following conditions: (1) he should be required to improve and memorialize his billing practices to properly generate bills and avoid confusion about work done; (2) he should establish a procedure of signing a fee agreement upon his first meeting with the client or, if not possible, he should send the fee agreement to the client, by registered mail, return receipt requested, and ask the client to sign it at the next meeting, whether in the office or in court; and (3) he should be required to develop a formal method of time-keeping, whether through a ledger book or electronically.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical

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[1] As explained below, we have only considered respondent's lack of contrition as an aggravating factor.

is fully supported by clear and convincing evidence. The record contains sufficient evidence to support a finding that respondent violated RPC 1.5(b), in that he did not have an executed fee agreement with White, as required by R. 5:3-5(a).[2] Respondent also violated RPC 8.1(b) by failing to submit his entire file in the White matter, including his billing notes kept on a legal pad. Despite the investigator's repeated requests for the full file, respondent complied to some extent, but not fully. He sent the few documents he had piecemeal, but never the entire file.

Moreover, respondent violated RPC 8.4(d) by entering into an agreement to dismiss the ethics grievance against him, in exchange for a resolution of the fee arbitration matter. Advisory Committee on Professional Ethics Opinion 721, 204 N.J.L.J. 928 (June 27, 2011), prohibits the conditioning of an agreement on the withdrawal of a grievance. As the opinion emphasizes, "[a]ttorney discipline is not a private cause of action or private remedy for misconduct that can be negotiated

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[2] Because all civil family action matters require written fee agreements, the fact that respondent had not regularly represented White is irrelevant.

between an attorney and the aggrieved party. The discipline process furthers public, not private interests . . . ."

As the DEC correctly found, however, the record lacks clear and convincing evidence that respondent's conduct during the ethics investigation was dishonest or deceitful. That charge centers on a discrepancy between the billing information that respondent submitted to the fee arbitration committee and to the investigator in this matter. The proofs do not clearly and convincingly establish that respondent intentionally misled the investigator or had any other ill intent. It is most likely that the omission of legal fees for a particular court appearance was inadvertent and the result of respondent's poor recordkeeping. His explanation that his memory was jogged by White's submissions in this matter is plausible. Further, respondent had nothing to gain by including his billed time at the investigative stage. Therefore, we determine to dismiss this charge.

There remains the question of the right degree of discipline for respondent's violation of RPC 1.5(a), RPC 8.1(b), and RPC 8.4(d).

Conduct involving failure to prepare the written fee agreement required by RPC 1.5, even if accompanied by other, non-serious ethics offenses, typically results in an admonition.

See, e.g., In the Matter of Gerald M. Saluti, DRB 11-358 (January 20, 2012) (attorney failed to communicate his fee in writing with respect to a post-conviction relief application and a potential appeal from the client's conviction); In the Matter of Myron D. Milch, DRB 11-110 (July 27, 2011) (attorney did not memorialize the basis or rate of his fee; the attorney also lacked diligence in the case and failed to communicate with the client); In the Matter of Eric S. Pennington, DRB 10-116 (August 3, 2010) (attorney did not timely set forth the basis or rate of his fee in writing); In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009) (attorney failed to memorialize the rate or basis of his fee and, in another client matter, failed to promptly deliver funds to a third party); and In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007) (in an estate matter, the attorney failed to provide the client with a writing setting forth the basis or rate of his fee, in violation of RPC 1.5(b)).

Generally, failure to cooperate with an ethics investigation, too, results in an admonition, if the attorney does not have an ethics history. See, e.g., In the Matter of Richard D. Koppenaal, DRB 13-164 (October 21, 2013) (failure to cooperate with an ethics committee's attempts to obtain information about the attorney's representation of a client; remaining charges were dismissed); In the Matter of Lora M.

Privetera, DRB 11-414 (February 21, 2012) (attorney submitted an inadequate reply to an ethics grievance; thereafter, she failed to cooperate in the ethics investigation until finally retaining counsel to assist her); In the Matter of James M. Docherty, DRB 11-029 (April 29, 2011) (attorney failed to comply with ethics investigator's request for information about the grievance; attorney also violated RPC 1.1(a) and RPC 1.4(b)); and In the Matter of Marvin Blakely, DRB 10-325 (January 28, 2011) (after his former wife filed a grievance against him, attorney ignored numerous letters from the district ethics committee seeking information about the matter; the attorney's lack of cooperation forced ethics authorities to obtain information from other sources, including the probation department, the lawyer for the former wife, and the attorney's mortgage company).

Finally, attorneys who have attempted to coerce a grievant to withdraw an ethics grievance have been met with a range of discipline, from an admonition to a censure. See, e.g., In the Matter of R. Tyler Tomlinson, DRB 01-284 (November 2, 2001) (admonition for attorney who improperly conditioned the resolution of a collection case on the dismissal of an ethics grievance filed against the attorney by the client's parents); In re Mella, 153 N.J. 35 (1998) (reprimand imposed for conduct prejudicial to the administration of justice; the attorney

communicated with the grievant in an attempt to have the grievance against him dismissed in exchange for a fee refund; the attorney was also guilty of lack of diligence and failure to communicate with clients); and In the Matter of Jeffrey R. Pocaro, 214 N.J. 46 (2013) (censure for attorney who attempted to negotiate the withdrawal of a grievance in exchange for his agreement to refrain from filing a defamation suit against his former client; significant ethics history - a one-year suspension and a censure - considered in aggravation).

Here, respondent, like the attorney in Mella, negotiated the withdrawal of the grievance in this matter, in exchange for a voluntary fee refund. Mella also had other, minor violations (lack of diligence and communication) that counterbalance respondent's failure to cooperate and his failure to prepare a written fee agreement.

In aggravation, the DEC considered that respondent failed to cooperate with ethics authorities. More properly, this conduct amounted to an RPC violation, as charged in the complaint, rather than an aggravating factor. The DEC also considered, in aggravation, the recordkeeping issues and the fact that respondent had no billing system in place. This, too, cannot be viewed as an aggravating factor. Attorney trust and business account recordkeeping is regulated by very detailed,

specific Court Rules (R. 1:21-6), and is monitored by the OAE, through, among other things, account audits conducted by the OAE random audit program. Because attorney recordkeeping is the subject of strict and accounting-specific rules, we find it more appropriate to have it examined by the OAE auditors to determine whether the bookkeeping method employed by the attorney falls short of the rule requirements. We note, too, that the DEC did not hear testimony as to respondent's recordkeeping system, generally. There is no evidence, one way or the other, as to whether the particular method for tracking his time in the White matter was respondent's standard practice or whether he normally employed a more formal recordkeeping system. The only aggravating factor that may be considered, therefore, is the DEC's finding that respondent displayed an "obvious" lack of contrition at the hearing.

In mitigation, respondent has a previously unblemished career of thirty years, an indication that his actions were aberrational and unlikely to occur again.

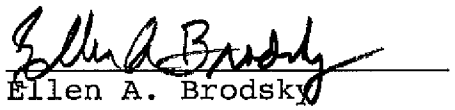
After consideration of the above circumstances, we determine that a reprimand is the right level of discipline in this case.

Member Gallipoli recommended a censure.

Vice-Chair Baugh did not participate. Member Rivera abstained.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Eryk A. Gazdzinski
Docket No. DRB 14-104

Argued: June 19, 2014

Decided: October 1, 2014

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Abstained	Did not participate
Frost			X			
Baugh						X
Clark			X			
Gallipoli			X			
Hoberman			X			
Rivera					X	
Singer			X			
Yamner			X			
Zmirich			X			
Total:			7		1	1

Ellen A. Brodsky
Chief Counsel